to violate the right of personal security than legislators. But furthermore, if carried to its logical conclusion, it would render the Amendment ineffectual in any case whatsoever; for if the seizure were under an unconstitutional statute or illegal warrant, the statute or the warrant would be a mere nullity, and therefore, the seizure could no more than in any other case be considered violative of the Amendment. As a matter of fact, the evidence has in most jurisdictions been admitted indifferently whether obtained under color of an illegal warrant[11] or not.[12]

It appears, therefore, that the true basis of most of the decisions is the argument that the means of obtaining evidence are not open to collateral inquiry. This is undoubtedly sound as a general proposition;[13] but it should be inapplicable where its effect is to degrade a constitutional privilege to the level of a mere rule of private law. It is so limited with regard to self-incrimination;[14] and there seems to be no valid distinction in this respect between the Fourth and Fifth Amendments. This theory is, nevertheless, undoubtedly supported by the great weight of authority.

A novel application of it was made in the recent case of *Weeks* v. *United States* (U. S. Sup. Ct., 1914. Not yet reported.) Here certain criminatory papers of the defendant were seized without a warrant. An application for their return, made to the court before trial, was denied; and upon the trial the papers were admitted in evidence. The Supreme Court held that the constitutional rights of the defendant had been violated, and reversed the conviction. While this decision is, perhaps, a necessary logical result of the accepted doctrine,[15] the conclusion that in all the many cases where unconstitutionally obtained evidence has been admitted, the result might have been reversed by a mere twist of procedure, certainly throws grave doubt upon the soundness of that doctrine.

PLEDGE OF CHATTELS WITHOUT PHYSICAL DELIVERY.—Delivery and continued possession are essential to the existence of a valid pledge,[1]

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[11]Ripper *v.* United States (C. C. A. 1910) 178 Fed. 24, rehearing denied (1910) 179 Fed. 497; Hardesty *v.* United States (C. C. A. 1908) 164 Fed. 420; People *v.* Aldorfer (1911) 164 Mich. 676.

[12]People *v.* LeDoux (1909) 155 Cal. 535; Commonwealth *v.* Tibbetts (1893) 157 Mass. 519; Gindrat *v.* People (1891) 138 Ill. 103; but see, under express words of constitution, State *v.* Griswold (1896) 67 Conn. 290.

[13]Wigmore, Evidence, § 2183.

[14]See Shields *v.* State, *supra;* Evans *v.* State, *supra.*

[15]The petition should have been granted. United States *v.* McHie (D. C. 1912) 194 Fed. 894; *cf.* United States *v.* Wilson (C. C. 1908) 163 Fed. 338; see Newberry *v.* Carpenter (1895) 107 Mich. 567; Rickers *v.* Simcox (1876) 1 Utah 33; but see N. Y. Cent. & H. R. R. R. *v.* United States (C. C. A. 1908) 165 Fed. 833, 842.

[1]See authorities collected in Jones, Pledges (3rd ed.) § 23 *et seq.* The reason generally assigned for this rule is the impolicy of permitting ostensible ownership by the pledgor, since it in most cases gives rise to a false credit. Unless, therefore, due care has been taken to negative such an appearance, the lien will not be upheld. Fourth St. Nat. Bank *v.* Millbourne Mills (C. C. A. 1909) 172 Fed. 177; Philadelphia Warehouse Co. *v.* Winchester (C. C. 1907) 156 Fed. 600.

and a bare agreement to pledge, although made in the utmost good faith, will give rise to no lien enforcible against innocent third persons,[2] unless validated by a subsequent delivery.[3] But notwithstanding the disfavor which attaches to secret liens, the importance of reducing to a minimum restrictions upon the freedom of trade forbids a too technical construction of the law of pledges. Hence, if once delivered, pawned property may be returned to its former holder for a special purpose without destroying the validity of the pledge,[4] on the theory that the pledgee's possession is constructively retained through his agent.[5] Although in such a case there is ostensible ownership in the pledgor, that circumstance alone should not be considered conclusive of fraud, but merely evidence thereof.[6]

For the same reasons, where the property sought to be pledged is reasonably incapable of manual delivery, on account of its bulk or intangibility, there may be a symbolic or constructive delivery, which, by putting the pledgee as far as possible in custody and control of the goods, will suffice to uphold the pledge.[7] In this connection, a warehouse receipt may be an efficient document of title and by its transfer a satisfactory delivery may be made;[8] but in order that it may have value as a security, and really stand in the place of the goods for which it is issued, the receipt must be issued by someone

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[2]American Can Co. *v.* Erie Preserving Co. (C. C. A. 1910) 183 Fed. 96. In equity, however, if an express executory agreement in writing indicates an intent to make identifiable property security for a debt, possession by the creditor is not, in the absence of fraud, essential to the existence of a lien enforcible against creditors with notice or an assignee in bankruptcy. Walker *v.* Brown (1897) 165 U. S. 654; Union Trust Co. *v.* Trumbull (1891) 137 Ill. 146; see Sexton *v.* Kessler (1912) 225 U. S. 90.

[3]In the absence of fraud, effect will thus be given to the intention of the parties; Thompson *v.* Fairbanks (1905) 196 U. S. 516; Parshall *v.* Eggert (1873) 54 N. Y. 18; but the rights of intervening creditors will not be prejudiced. American Pig Iron Co. *v.* German (1899) 126 Ala. 194; see *In re* Automobile Livery Service Co. (D. C. 1910) 176 Fed. 792.

[4]Jones, Pledges (3rd ed.) § 44. But where the location of the pledge is not to be changed, some courts have failed to see the necessity for two ceremonial deliveries. Merchant's Bank *v.* Hibbard (1882) 48 Mich. 118; Nat. Exch. Bank *v.* Wilder (1885) 34 Minn. 149.

[5]See Cooley *v.* Minnesota Transfer Ry. Co. (1893) 53 Minn. 327; Reeves *v.* Capper (1838) 5 Bing. (N. C.) 136.

[6]Macomber *v.* Parker (Mass. 1833) 14 Pick. 497; see *Ex parte* Fitz (U. S. D. C. 1876) 2 Low. 519; *contra,* Griffen *v.* Henry (1901) 99 Ill. App. 284.

[7]Jewett *v.* Warren (1815) 12 Mass. *300; First Nat. Bank *v.* Harkness (1896) 42 W. Va. 156. In the absence of fraud, a trustee in bankruptcy cannot avoid the transaction, Bush *v.* Export Storage Co. (C. C. 1904) 136 Fed. 918, even if the pledge occurred within the four months period. Love *v.* Export Storage Co. (C. C. A. 1906) 143 Fed. 1.

[8]Union Trust Co. *v.* Wilson (1905) 198 U. S. 530. In some jurisdictions, however, either by virtue of a statute, Citizens Banking Co. *v.* Peacock (1897) 103 Ga. 171, or custom, Whitney *v.* Tibbitts (1863) 17 Wis. 369, where the intent is clear, endorsement of the receipt would seem unnecessary.

actually in the warehouse business, other than the owner of the goods,[9] and the transaction must be free from any suggestion of sham.[10]

The recent case of *Taney* v. *Penn National Bank of Reading* (1914) 34 Sup. Ct. Rep. 288,[11] marks the present limit in the adaptation of established rules of law to needs of trade. In that case, the Supreme Court held that the handing over as collateral security of a distiller's receipt for whisky then stored in his bonded warehouse, was a sufficient delivery to constitute a pledge valid against the distiller's trustee in bankruptcy,[12] since no creditors had been in fact misled, and the goods, which it was impracticable to store elsewhere, were under the complete control of the Government.[13] Government possession, however, while immune from disturbance before payment of the tax by the distiller,[14] is rather in the nature of a joint custody over the warehouse with but incidental control over its contents, which may be terminated at any time by the distiller upon payment of the levy.[15] But the Government, in this case, having neither issued receipts for the spirits nor attorned to the pledgee, had made no delivery, while the receipt of the distiller, as failing to restrain further acts of dominion by him, was not only invalid as a document of title but hazardous as a security.[16] The decision of the principal case, therefore, must be based not upon the technical law of pledges, but upon the practical policy of enabling a release of capital for further production by giving effect to the established custom of a particular trade, and should be confined to the particular facts.

FUNCTIONS OF COURT AND JURY IN NEGLIGENCE CASES.—A peculiar development of the law is found in the general practice of allowing the jury to pass upon the issue of negligence, which, upon undisputed facts, is essentially a question of law.[1] It is almost universally held,

[9]Tradesman's Bank *v.* Jagode (1898) 186 Pa. 556; Fourth St. Nat. Bank *v.* Millbourne Mills, *supra.*

[10]A pledgee must have exclusive possession, Collins *v.* Buck (1874) 63 Me. 459, and if the bankrupt pledgor has had actual control over the property, this evident subterfuge makes a pledge impossible. Security Warehousing Co. *v.* Hand (1907) 206 U. S. 415.

[11]See also the opinions of the lower courts. (D. C. 1910) 176 Fed. 606; (C. C. A. 1911) 187 Fed. 689.

[12]The inquiry must be limited to the sufficiency of the delivery, and in this connection the equitable rights of the parties are not changed by the commencement of bankruptcy proceedings, Hurley *v.* Atchison, T. & S. F. Ry. (1909) 213 U. S. 126, although the trustee now has the lien of a judgment creditor. See 13 Columbia Law Rev. 158.

[13]A similar transaction was held to create simply an equitable lien. Pattison *v.* Dale (C. C. A. 1912) 196 Fed. 5.

[14]McCullough *v.* Large (C. C. 1884) 20 Fed. 309.

[15]United States *v.* 36 Barrels of High Wines (U. S. C. C. 1870) 7 Blatch. 459; see Rev. Stat. 3271 (U. S. Comp. Stat. 1901, p. 2122).

[16]See *In re* Rohrer (D. C. 1911) 186 Fed. 997, which must be considered overruled by the principal case; Loveland, Bankruptcy, § 479; see notes 14, 15, *supra.*

[1]1Chamberlayne, Evidence § 123; 9 Columbia Law Rev. 156. Proximate cause, however, is generally regarded as an inquiry of fact to be left to the jury. See Davis *v.* N. Y. C. & H. R. R. R. (1872) 47 N. Y. 400.